

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR BENEFICIAL)	FINAL
WATER USE 41S-104572 BY)	ORDER
BY KENNETH KNERR)	
)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the May 21, 1999, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 41S-104572 by Kenneth Knerr is DENIED.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

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Kenneth Knerr
App. 41S-104572

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CASE # 104572

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 23rd day of June, 1999.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 25th day of June, 1999, as follows;

KENNETH KNERR
RT 2 BOX 2196
LEWISTOWN MT 59457

WILLIAM A SPOJA JR
PO BOX 882
LEWISTOWN MT 59457

LONG FAMILY TRUST
BRUCE & SARIATA LONG, TRUSTEES
13647 BARLIN AVE
DOWNEY CA 90242

EMMET BUTCHER
RT 2 BOX 2190
LEWISTOWN MT 59457

LAURENCE JENNI
RT 2 BOX 2228
LEWISTOWN MT 59457

ROBERT STONE
223 MAPLE
LEWISTOWN MT 59457

PETER K ANDERSEN
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SAMUEL V WEIDNER
301 B S MAIN STE 200
ELKHART IN 46516


WICKS RANCH CORP
JON WICKS
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VINCENT L & MARY GOSSACK
RT 2 BOX 2197
LEWISTOWN MT 59457

CARL DEBELLY
505 W MAIN
LEWISTOWN MT 59457

SCOTT IRVIN, MANAGER
LEWISTOWN WATER RESOURCES
REGIONAL OFFICE
613 NE MAIN STE E
LEWISTOWN MT 59457

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
PO BOX 201601
HELENA MT 59620-1601


Mandi Shulund
Hearings Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
FOR BENEFICIAL APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE)	FOR
41S-104572 BY KENNETH KNERR)	DECISION
)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on April 14, 1999, in Lewistown, Montana, to determine whether a beneficial water use permit should be issued to Kenneth Knerr (Applicant) for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311 (1) and (5) (1997).

APPEARANCES

Applicant appeared at the hearing in person and by and through counsel, Robert Spoja. Fred Knerr, Mary Knerr, and Fred Gillett appeared at the hearing and testified for Applicant.

Objectors Long Family Trust, Emmet Butcher, Laurence Jenni, Robert Stone, Peter K. Anderson, Samuel V. Wiedner, Wicks Ranch Corp., and Vincent L. and Mary J. Gossack appeared at the hearing by and through counsel, Carl DeBelly. Don Jenni, John Wicks, Vince Gossack, Peter Anderson, and Tom Butcher appeared at the hearing and were called to testify by Objectors.

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Scott Irvin, Manager, and Andy Morely, Water Resource Specialist, both with the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) attended the hearing and were called to testify by Objectors.

EXHIBITS

Neither Applicant nor Objectors offered exhibits for the record.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of and signed by Kenneth Knerr was filed with the Department on July 30, 1998, at 11:00 a.m. (Department file.)

2. Pertinent portions of the application were published in the *News-Argus*, a newspaper of general circulation in the area of the source, on January 27, 1999. Additionally, the Department served notice on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Eight timely objections were received by the Department. Applicant was notified of the objections by a letter from the Department dated February 19, 1999. (Department file.)

3. Applicant proposes to appropriate 115 gallons per minute up to 20.00 acre-feet of the water of Big Spring Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, Township 15 North, Range 18 East, Fergus County, Montana. The proposed use is sprinkler irrigation of 10.00 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, Township 15 North, Range 18 East. The proposed means of diversion is a headgate. The proposed means of conveyance is the Clegg Ditch. The proposed period of diversion and use is from June 1 through September 30, inclusive of each year. (Department file and testimony of Applicant.)

4. Applicant has not proven by a preponderance of evidence water is physically and legally available during the period in which Applicant seeks to appropriate, in the amount requested. There were no flow measurements to identify physical water availability. There was no indentification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use, nor was there any comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

5. Applicant has not proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation would not be adversely affected. Applicant has not proven by a preponderance of evidence the proposed means of diversion,

construction, and operation of the appropriation works are adequate.

Clearly, if Applicant attempts to convey the water through the Clegg Ditch, the water rights of prior appropriators would be adversely affected. Clegg Ditch is in poor condition, having an area which loses water creating a large bog at the Long's place. The other users of Clegg Ditch cannot now use all of their water rights because the ditch is not large enough to carry all the water rights of all the users. Objector Jenni, at the end of the ditch, does not now receive any water from the Clegg Ditch. In the past, the users of Clegg Ditch have had an agreement for sharing the water so that all users received some water.

(Testimony of Fred Knerr, Don Jenni, John Wicks, Vince Gossack, Peter Anderson, and Tom Butcher.)

6. The proposed use of the water, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2). The flow rate and volume of water requested are reasonable for the crops customarily grown and the climatic area. (Department file.)

7. Applicant has proved by a preponderance of evidence he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. He owns the proposed place of use. (Department file.)

8. No objections relative to water quality were filed against this application nor were there any objections relative

to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1997).

2. Applicant has failed to meet the criteria for issuance of a beneficial water use permit. See Findings of Fact 4 and 5. Mont. Code Ann. § 85-2-311.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

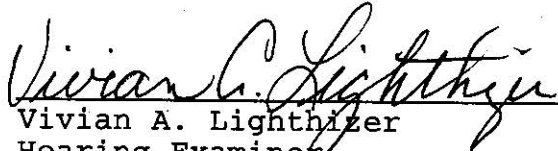
Application for Beneficial Water Use Permit 41S-104572 by Kenneth Knerr is DENIED.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the

precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 21st day of May, 1999.


Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision and Memorandum was served upon all parties listed below on this _____ day of May, 1999.

KENNETH KNERR
RT 2 BOX 2196
LEWISTOWN MT 59457

WILLIAM A SPOJA JR
PO BOX 882
LEWISTOWN MT 59457

LONG FAMILY TRUST
BRUCE & SARIATA LONG, TRUSTEES
13647 BARLIN AVE
DOWNEY CA 90242

EMMET BUTCHER
RT 2 BOX 2190
LEWISTOWN MT 59457

LAURENCE JENNI
RT 2 BOX 2228
LEWISTOWN MT 59457

ROBERT STONE
223 MAPLE
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PETER K ANDERSEN
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SAMUEL V WEIDNER
301 B S MAIN STE 200
ELKHART IN 46516

WICKS RANCH CORP
JON WICKS
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VINCENT L & MARY GOSSACK
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SCOTT IRVIN, MANAGER
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NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
PO BOX 201601
HELENA MT 59620-1601

Mandi Shulund by af
Mandi Shulund
Hearings Assistant

MEMORANDUM

Although Applicant failed to meet the statutory requisites for issuance of a permit for this application, there nothing to prevent the filing of a new application for beneficial water use permit to divert water directly from Big Spring Creek and pipe it to the proposed place of use. All the Objectors expressed they would have no objection to such a filing. It is the Hearing Examiner's opinion, if sufficient evidence is submitted to prove the statutory criteria, this would be a much better solution to the problem. Not only would Applicant no longer need to share the ditch water with the other users, he could take the water at any time up to the amount permitted during the period of permitted appropriation. Certainly it would be more expensive getting started, due to the cost of the pump and pipe. However, it would eliminate the possibility of burning up a pump in the ditch when someone shuts off the ditch without warning.

If a permit had been granted to take the water from Clegg Ditch, it would most likely be a useless water right. All other appropriators on the ditch have senior priority dates and the right to use the water first. Unless Applicant paid to increase the capacity of Clegg Ditch from the stream headgate to Applicant's field turnout it is doubtful applicant would ever receive water.

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE
APPLICATION FOR BENEFICIAL
PERMIT 411-105511 BY
FLYING J INC.

FINAL
ORDER

The time period for filing exceptions, objections, or
comments to the Proposal for Decision in this matter has
expired. No timely written exceptions were received.
Therefore, the Department of Natural Resources and
Conservation hereby accepts and adopts the Findings of Fact
and Conclusions of Law as contained the August 2, 1999,
Proposal for Decision, and incorporates them herein by
reference.

WHEREFORE, based upon the record herein, the Department
makes the following:

ORDER

Subject to the terms, conditions, restrictions, and
limitations listed below, Beneficial Water Use Permit 411-
105511 is granted to Flying J Inc. to appropriate 200
gallons per minute up to 60 acre-feet of groundwater at a
point in the SE1/4SW1/4 of Section 17, Township 11 North,
Range 03 West, in Lewis and Clark County, Montana. The
permitted uses are 80 gallons per minute up to 40 acre-feet
of water for commercial and 120 gallons per minute up to 20
acre-feet of water for irrigation. The permitted place of

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use for the commercial use is SE~~XXXXXX~~ and for the irrigation use is 8.00 acres in the SE~~XXXXXX~~ of Section 17, Township 11 North, Range 03 West, Lewis and Clark County, Montana. The permitted means of diversion is a well and pump. The permitted period of diversion for commercial use is from January 1 through December 31, inclusive of each year. The permitted period of use for irrigation is from May 1 through October 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep monthly written records of the flow rate and volume measurements and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.

HELENA PH: 406-449-0944 FAX: 406-442-9315

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The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

C. This right is subject to Mont. Code Ann. ' 85-2-505 (1997) requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made,

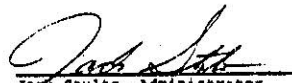
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the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 7th day of September, 1999.


Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

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Application 417-109811 by Frying J

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CASE # 105571

Application No. 41
 Preliminary Analysis
 Adopted as Final File

Analyze the applicant's:
 No. In narrative form, if
 preliminary analysis prior
 documentation is needed
 a hearing, do not conduct

1. Did the applicant
 of diversion and
 water? The applicant
 within the area
 existing legal de

The applicant is
 physically available
 of Section 17,
 over a 1/4 mile

2. Did the applicant
 appropriator and
 no adverse effect
 use will be contr

Lindsay Drilling
 proposed well is
 southwest of the
 from pumping
 located farther

3. Did the applicant
 are adequate?
 including divers
 incorporating fee
 features?

The design and
 The information
 adequate in sup

4. Did the applicant
 needed for the p

The proposed ut
 under Montana V
 volume request

5. ☒ Yes ☐ No
☒ Yes ☐ No N/A

PROJECT TIME LINE: T
 time line for purchasing ar
 how much water will be p

☒ Yes ☐ No
☒ Yes ☐ No

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the
 foregoing Final Order was served on all parties listed below
 on this 08 day of September, 1999, as follows:

PDG, INC
 DOTTY HARDINGER
 50 W 990 S
 BRIGHAM CITY UT 84302

LARRY MARSHALL, LS
 MT ASSOCIATED, INC
 4528 HWY 12 W
 HELENA MT 59601

LAWRENCE L SICKERSON
 1000 WILD WIND RD
 HELENA MT 59602

NANCY ANDERSEN, CHIEF
 WATER RIGHTS BUREAU
 DEPARTMENT OF NATURAL RESOURCES
 AND CONSERVATION
 PO BOX 201601
 HELENA MT 59620-1601

TERRI MCLAUGHLIN, MANAGER
 JIM BECK, CES
 HELENA WATER RESOURCES
 REGIONAL OFFICE
 DEPARTMENT OF NATURAL RESOURCES
 AND CONSERVATION
 PO BOX 201601
 HELENA MT 59620-1601

Mandi Shulund
 Mandi Shulund
 Hearings Assistant

Final Order
 Application 411-105511 by Flying J

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CASE # 105 511

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 9th day of September, 1999, as follows:

PDG, INC
DOTTY HARDINGER
50 W 990 S
BRIGHAM CITY UT 84302

LARRY MARSHALL, LS
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4528 HWY 12 W
HELENA MT 59601

LAWRENCE L SICKERSON
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HELENA MT 59602

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HELENA MT 59620-1601

Mandi Shulund
Mandi Shulund
Hearings Assistant

Final Order
Application 412-105511 by Flying J

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CASE # 105511

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE)	PROPOSAL
APPLICATION FOR BENEFICIAL)	FOR
PERMIT 411-105511 BY)	DECISION
FLYING J INC.)	

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on April 27, 1999, in Helena, Montana, to determine whether a Beneficial Water Use Permit should be granted to Flying J Inc. for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1997).

APPEARANCES

Flying J Inc. (Applicant) appeared at the hearing with Dotty Hardinger presenting testimony. Larry Marshall, Civil Engineer with MT Associates, Inc.; David Hoerning, Land Surveyor with MT Associates, Inc.; Larry Wycoff, Certified Water Operator with MT Associates Inc.; Terry Lindsay, Lindsay Drilling; and Mike Kaczmarek, Geologist with Morrison Maierle, Inc., appeared at the hearing as witnesses for the Applicant.

Objector Lawrence Sickerson appeared at the hearing in person.

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Jim Beck, Civil Engineering Specialist (CES) with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

EXHIBITS

Applicant offered 15 exhibits for the record. All, except Exhibit 16, were accepted without objection. The Hearing Examiner declined to accept Exhibit 16 because there was a copy in the file which is a part of the record. Applicant did not offer Exhibits 8 and 9. Objector offered no exhibits for the record.

Applicant's Exhibit 1 is a water surface map prepared by MT Associates, Inc. This map shows the gradient and flow direction of the groundwater in the area of the proposed project.

Applicant's Exhibit 2 is a spreadsheet showing the water elevations of various wells and locations.

Applicant's Exhibit 3 consists of 12 pages and are laboratory analyses of water samples.

Applicant's Exhibit 4 consists of two pages which are the data from the irrigation well during the aquifer test.

Applicant's Exhibit 5 consists of eleven pages. The first page is a copy of Objector Sickerson's well log. The remaining 10 pages are reports from the Groundwater Information Center database of the Montana Bureau of Mines and Geology.

Applicant's Exhibit 6 consists of two pages. The first page is a copy of a topographic map of the project area and

surrounding area. The second page is an enlargement of Section 17, Township 11 North, Range 03 West, Lewis and Clark County, Montana.

Applicant's Exhibit 7 is a survey map showing the location of the proposed project and the property features of the area.

Applicant's Exhibit 10 consists of two pages which are copies of portions of a USGS map upon which has been imposed the altitude and configuration of the shallow potentiometric surface and location of selected wells in the Helena area taken from the Briar and Madison Report.

Applicant's Exhibit 11 is a contour map which shows an underground drain pipe (the dashed line running east and west) installed by the BLM. This drain pipe runs under the proposed project site.

Applicant's Exhibit 12 consists of two pages. The first page is a map showing the fault distribution of the Helena Valley as mapped by Stickney and Schmidt. The second page is a geologic time scale.

Applicant's Exhibit 13 consists of three pages. The first two pages are a letter to Larry Marshall from the Department of Environmental Quality dated January 12, 1999. The third page is the Phosphorus breakthrough calculations.

Applicant's Exhibit 14 consists of 10 pages and a large map. These documents were assembled as the Criteria Addendum to Applicant's application for beneficial water use permit.

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